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No. 89-197

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ELECTRO-NUCLEONICS, INC.,  
*Petitioner,*  
v.

THE WASHINGTON SUBURBAN SANITARY COMMISSION,  
*Respondent.*

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On Petition for Writ of Certiorari to the  
Court of Appeals of Maryland

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RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Does the decision of the Court of Appeals of Maryland which held that Petitioner's cause of action for inverse condemnation for the taking of its right to enforce a restrictive covenant accrued upon the condemnation of the burdened estate, conflict with this Court's opinion in *United States v. Dickinson*, 331 U.S. 745 (1947)?

II. Does the decision of the Court of Appeals of Maryland unconstitutionally preclude the right to obtain severance damages where the state develops condemned property years after the property was condemned?

III. Did the Court of Appeals of Maryland, in affirming the state trial court's granting of summary judgment for the Respondent on Petitioner's claim for a non-possessory taking of its property, properly consider the Petitioner's failure to produce sufficient evidence to show that the Respondent's sludge composting facility significantly impaired Petitioner's ability to manufacture bio-medical products on its property, which is the stated use of the property?



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**RESPONDENT'S BRIEF IN OPPOSITION**

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The Respondent, Washington Suburban Sanitary Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari.

**STATEMENT OF THE CASE<sup>1</sup>**

On July 8, 1980, the Washington Suburban Sanitary Commission ("WSSC"), a Maryland bi-county sewer and water agency, condemned a parcel of approximately 115 acres in the Montgomery Industrial Park ("Industrial Park"), known as "Site 2," for the purpose of building and thereafter operating a sewage sludge composting facility on the property. This condemnation was the direct

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<sup>1</sup> Respondent believes that petitioner's statement of the case does not fully and accurately reflect the facts as found by the Court of Appeals of Maryland in the opinion below.

result of a prior Order issued by the United States District Court for the District of Columbia requiring the WSSC to locate and operate a sewage sludge composting facility at Site 2. That Order was, in turn, the result of lengthy litigation involving the responsibility of certain District of Columbia area jurisdictions for the disposition of sewage sludge generated by the Blue Plains Sewage Treatment Plant. Pet. App. 2a.

Prior to WSSC's condemnation of Site 2 in July 1980, a scheme of restrictive covenants burdened the Industrial Park property by virtue of declarations recorded in the Land Records of Montgomery County in 1956 and 1959. Those restrictions prohibited, among other things, the emission of "objectionable odors" beyond lot lines, the use of the land as a dump or sanitary landfill, and the dumping or maintaining of waste material or refuse on any part of the property outside of buildings. Pet. App. 2a. Electro-Nucleonics, Inc. ("Electro-Nucleonics"), which has operated a bio-medical manufacturing business on a parcel in the Industrial Park (Lot 6) that it has owned since 1971, claims to be a beneficiary under the covenants. The lot owned by Electro-Nucleonics is adjacent to Site 2. Pet. App. 3a.

In its eminent domain action to acquire Site 2, WSSC named as defendants the owners of the parcels comprising Site 2. WSSC did not join as defendants the owners of adjacent lots, such as Electro-Nucleonics, whose property arguably was benefitted by the restrictive covenants. Rather, on November 6, 1980, WSSC filed a declaratory judgment action in the Circuit Court for Montgomery County, Maryland against identified and unidentified property owners both within and outside of the Industrial Park, who claimed damages or relief of any kind purportedly arising from "the violation, abrogation or non-observance" of the recorded covenants or "for a purported 'taking' of property rights or interests without the payment of just compensation" stemming from WSSC's ac-

quisition of Site 2 for a sewage sludge composting facility. Pet. App. 2a-3a. See *Washington Suburban Sanitary Commission v. Frankel*, 57 Md. App. 419, 470 A.2d 813 (1984), *vacated*, 302 Md. 301, 487 A.2d 651 (1985). Many of the property owners identified in the declaratory action filed responsive counterclaims against WSSC for compensation for the taking of their rights to enforce the covenants against WSSC. Electro-Nucleonics was one of the named defendants in the *Frankel* case; however, Electro-Nucleonics did not file such a counterclaim.

In its *Frankel* opinion, the Maryland Court of Special Appeals held that the owners of property within the Industrial Park owned "dominant tenements with respect to the restrictive covenants to which Site 2 was subject prior to its acquisition by WSSC" and that the owners of those properties therefore had a "right to compensation by virtue of WSSC's taking of the property interest which those negative easements represent." 57 Md. App. at 435, 470 A.2d at 821; Pet. App. 3a. The Maryland Court of Appeals, in an opinion filed February 7, 1985, vacated the decision of the intermediate appellate court for want of a final judgment and remanded the case to the trial court for further proceedings. On remand, WSSC filed an amended complaint for declaratory relief and dismissed its action as to Electro-Nucleonics, without prejudice. Electro-Nucleonics did not object to the dismissal. Pet. App. 4a.

On March 27, 1986, nearly six years after WSSC condemned Site 2, Electro-Nucleonics filed an action for inverse condemnation against WSSC in the Circuit Court for Montgomery County, Maryland. The complaint, as amended, sought that a "taking be declared, that the covenants . . . be condemned and that WSSC pay to Plaintiff twenty million dollars as damages for the taking of the covenants." Pet. App. 4a. In answering Electro-Nucleonics' complaint, WSSC alleged, among other defenses, that the claim was barred because the statute of limitations had run.



On March 20, 1987, Electro-Nucleonics filed a motion for partial summary judgment as to liability, asking the trial court to rule that WSSC's "ownership of and activities on Site [2] violate these covenants and amount to a taking for which plaintiff must be compensated." Pet. App. 4a. Electro-Nucleonics also asked the trial court to rule that its claim for inverse condemnation against WSSC was not barred by the applicable statute of limitations. Electro-Nucleonics asserted that the applicable provision was Maryland's general limitations statute which provides that "a civil action at law shall be filed within three years from the date it accrues. . . ." Md. Code Ann., Cts. & Jud. Proc. Art., § 5-101.

On January 26, 1988, WSSC moved for summary judgment on the ground that the alleged impact of WSSC's operations at Site 2 on Electro-Nucleonics' property did not constitute a constitutionally compensable taking of property. Pet. App. 5a. Electro-Nucleonics opposed the motion but failed to present any facts to show that WSSC's operations at Site 2 had a significant impact on its ability to operate its business and to use its Industrial Park property for its intended purpose.

On February 5, 1988, the Circuit Court for Montgomery County, Maryland denied Electro-Nucleonics' motion for partial summary judgment and after a second hearing on May 2, 1988, granted summary judgment in favor of WSSC. As to the taking of the covenants, the trial court found that any loss to the property of Electro-Nucleonics occurred in July, 1980, when the WSSC condemned Site 2. Pet. App. 6a. With respect to Electro-Nucleonics' contention that there had been a non-possessory taking of its fee, the trial court concluded that there was insufficient evidence to show that Electro-Nucleonics' use of its property had been significantly impaired. Pet. App. 6a.

The Maryland Court of Appeals affirmed the trial court's entry of summary judgment for WSSC. The

Court of Appeals held that Electro-Nucleonics' claim for the taking of its covenants was barred by Maryland's three year statute of limitations because the claims accrued in July, 1980 when WSSC condemned Site 2. The Court of Appeals also held that Electro-Nucleonics' claim for a non-possessory taking was properly rejected because Electro-Nucleonics failed to present sufficient factual evidence to establish an issue as to whether the alleged bio-burden from Site 2 significantly impaired Electro-Nucleonics' ability to use its property for its intended purpose, namely, to manufacture viruses for research and diagnostic purposes. Pet. App. 19a. Electro-Nucleonics' motion for reconsideration was denied on May 5, 1989. Pet. App. 23a.

## REASONS FOR DENYING THE WRIT

### I. THE MARYLAND COURT OF APPEALS' DECISION THAT A CAUSE OF ACTION FOR INVERSE CONDEMNATION ACCRUES AT THE TIME OF THE TAKING DOES NOT CONFLICT WITH THIS COURT'S OPINION IN *UNITED STATES v. DICKINSON*, 331 U.S. 745 (1947).

Petitioner contends that the opinion below directly contradicts this Court's decision in *United States v. Dickinson*, 331 U.S. 745 (1947). The Petition should be denied because there is no such conflict. Specifically, the holding of the Maryland Court of Appeals that an action for inverse condemnation of restrictive covenants accrues at the time that the covenants are extinguished is fully compatible with this Court's ruling in *Dickinson* that an action for inverse condemnation for the gradual physical taking of property accrues when the taking is complete. Indeed, the opinion below is readily distinguishable from *Dickinson*.

Electro-Nucleonics contends that *United States v. Dickinson*, 331 U.S. 745 (1947) stands for the broad proposition that a claim for inverse condemnation does not ripen

until all of the resulting damages are apparent. Thus, Electro-Nucleonics claims that *Dickinson* is at odds with the opinion below which held that Electro-Nucleonics' claim for inverse condemnation ripened in 1980 when the 115 acres of the industrial park were condemned, rather than in 1983 when the WSSC composting facility was operational and allegedly causing harm to petitioner's property. However, a careful examination of *Dickinson* reveals that it is not applicable to the facts and circumstances of the present case.

*Dickinson* involved the construction of a dam by the United States on the Kanawha River in West Virginia. Construction of the dam resulted in the gradual, but continuous flooding of the plaintiffs' property. The question before the Court was whether a constitutionally compensable *physical taking* of the plaintiffs' property occurred when the river first began to rise; when the dam was fully operational; or when the flooding conditions first stabilized. This Court ruled that where the government "brought about a taking by a continuous process of physical events," the property owner's cause of action did not accrue until the continuing process had stabilized and the property owner could determine exactly what the government had taken. 331 U.S. at 749. Consequently, this Court concluded that *Dickinson*, as a property owner adversely affected by the gradual flooding, was not required to file a condemnation action against the United States until the extent of the physical taking was certain and damages could be assessed. *Id.*

In *Dickinson*, this Court held that the statute of limitations did not begin to run until the property was fully taken by the United States. In *Electro-Nucleonics*, the property was fully taken by the WSSC in July 1980, when WSSC condemned the 115 acres of industrial park and thereby deprived Electro-Nucleonics of the benefit of the restrictive covenants which previously burdened Site 2. See 2 AMERICAN LAW OF PROPERTY § 9.40 (1952); RE-

STATEMENT OF PROPERTY § 566 (1944); 2 NICHOLS ON EMINENT DOMAIN § 5.15[1] (rev. 3d ed. 1985). The injury or damage to *Electro-Nucleonics* was the value of the loss of its intangible right to enforce those restrictive covenants. In *Dickinson*, the injury or damage to the property owner was the value of the flooded property. In both instances, the statute of limitations began to run when the loss to the property owner was complete.

What distinguishes *Dickinson* from the opinion below is that *Dickinson* involved the gradual physical taking of land by flooding, while *Electro-Nucleonics* involves the direct taking of an intangible property right—a restrictive covenant—by operation of law. Moreover, the source of the claim in *Dickinson* was the gradual rising of a river which was a continuous process of physical invasion of Dickinson's land. The source of *Electro-Nucleonics'* claim is the destruction of a right to enforce a restrictive covenant resulting from a discrete legal process which involved no physical invasion of *Electro-Nucleonics'* land.

This Court's decision in *Dickinson* is the outgrowth of an unusual factual setting and applies only to situations where there is a continuing or gradual physical invasion or destruction of private property. Indeed, the rationale for this holding is to avoid piecemeal and premature litigation. However, where there is a taking of an intangible property interest which occurs at a discrete point in time, such a taking is complete, rather than gradual, and the damage is ascertainable at the moment of the taking. Since the moment of the taking of *Electro-Nucleonics'* restrictive covenant occurred in 1980 when WSSC condemned Site 2, the Maryland Court of Appeals correctly ruled that *Electro-Nucleonics'* cause of action for inverse condemnation accrued at the time of the condemnation in July, 1980.

## II. THE DECISION OF THE MARYLAND COURT OF APPEALS DOES NOT PRECLUDE THE RIGHT TO SEVERANCE DAMAGES WHERE THE STATE DEVELOPS CONDEMNED PROPERTY YEARS AFTER THE PROPERTY WAS CONDEMNED.

Petitioner argues that the Maryland Court of Appeals' ruling that the taking of Electro-Nucleonics' right to enforce the covenants occurred when WSSC condemned the burdened estate, prevents petitioner from recovering severance damages to the remainder of its property. However, the opinion below does not affect the right to severance damages. This is because it is well-established that severance damages are measured as of the date of taking and not as of some future date. *State Roads Comm'n. v. Toomey*, 302 Md. 94, 485 A.2d 1006 (1985); *Big Pool Holstein Farms, Inc. v. State Roads Comm'n.*, 245 Md. 108, 225 A.2d 283 (1967).

In *Bauman v. Ross*, 167 U.S. 548 (1897), and again in *United States v. Dickinson*, 331 U.S. 745 (1947), this Court recognized that where there is a partial taking by the sovereign, the property owner is entitled to both the value of the property taken, as well as any consequential damage to the remainder. The right to severance damages, however, does not mean that a property owner may wait indefinitely to determine the effect of the sovereign's use of the condemned tract on the remainder of the owner's property. Thus, to the extent that severance damages are recoverable, they are to be measured as of the date of taking based on the difference between the fair market value of the property immediately before the taking and its fair market value immediately after the taking. See *Sharp v. United States*, 191 U.S. 341, 354 (1903); *Bauman v. Ross*, *supra*, 167 U.S. 548.

The Maryland Court of Appeals' decision regarding the date of the taking of Electro-Nucleonics' covenant right is not in conflict with the existing law on the recovery of severance damages. Nothing in the opinion below states

or even implies that severance damages are unavailable. Petitioner simply lost its right to maintain an inverse condemnation action and a claim for severance damages because it waited too long to file suit.

**III. THE MARYLAND COURT OF APPEALS CORRECTLY RULED THAT ELECTRO-NUCLEONICS PRESENTED INSUFFICIENT EVIDENCE TO SHOW THAT THE WSSC'S OPERATION OF SITE 2 SUBSTANTIALLY INTERFERED WITH ELECTRO-NUCLEONICS' BIOMEDICAL MANUFACTURING BUSINESS.**

Electro-Nucleonics argues that the Maryland Court of Appeals applied the wrong standard in determining whether it presented sufficient evidence to support a non-possessory taking of its property. Specifically, Electro-Nucleonics contends that the Maryland Court of Appeals incorrectly denied its non-possessory taking claim based on a finding that it failed to produce sufficient evidence with respect to the magnitude of its damages. In so doing, Electro-Nucleonics claims that the Court of Appeals of Maryland violated this Court's holding in *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987). However, a careful examination of the decision below reveals that the Court of Appeals of Maryland applied the correct standard and did not rule inconsistently with *Nollan*.

*Nollan* involved an access condition imposed by the California Coastal Commission which required that private property owners allow the public an easement to cross a portion of their property to reach nearby beaches. In *Nollan*, this Court held that the access condition gave rise to a physical invasion or taking of a private property owner's land and was a constitutionally compensable taking. However, *Nollan* did not affect the standard for determining when a non-possessory taking of property occurred.



The Maryland Court of Appeals' decision that Electro-Nucleonics could not withstand a motion for summary judgment on its non-possessory taking claim was based on that court's previous decision in *Maryland Port Administration v. QC Corp.*, 310 Md. 379, 529 A.2d 829 (1987) which, in turn, relied on this Court's decisions in *United States v. Causby*, 328 U.S. 256 (1946) and *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). In *QC Corp.*, the Court of Appeals of Maryland held that in order to maintain a claim for a non-possessory taking there must be a high degree of interference with the use of the property. This standard for a constitutional non-possessory taking applied by the Maryland Court of Appeals in *Electro-Nucleonics*, is sound and consistent with well-established law regarding the standard for determining whether there has been a non-possessory constitutional taking.

The Maryland Court of Appeals denied Electro-Nucleonics' non-possessory taking claim because Electro-Nucleonics was unable to produce sufficient evidence to show that its use of its property or its business had been affected. There is no constitutional infirmity in the decision of the Maryland Court of Appeals affirming the granting of summary judgment for WSSC on Electro-Nucleonics' claim for a non-possessory taking.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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